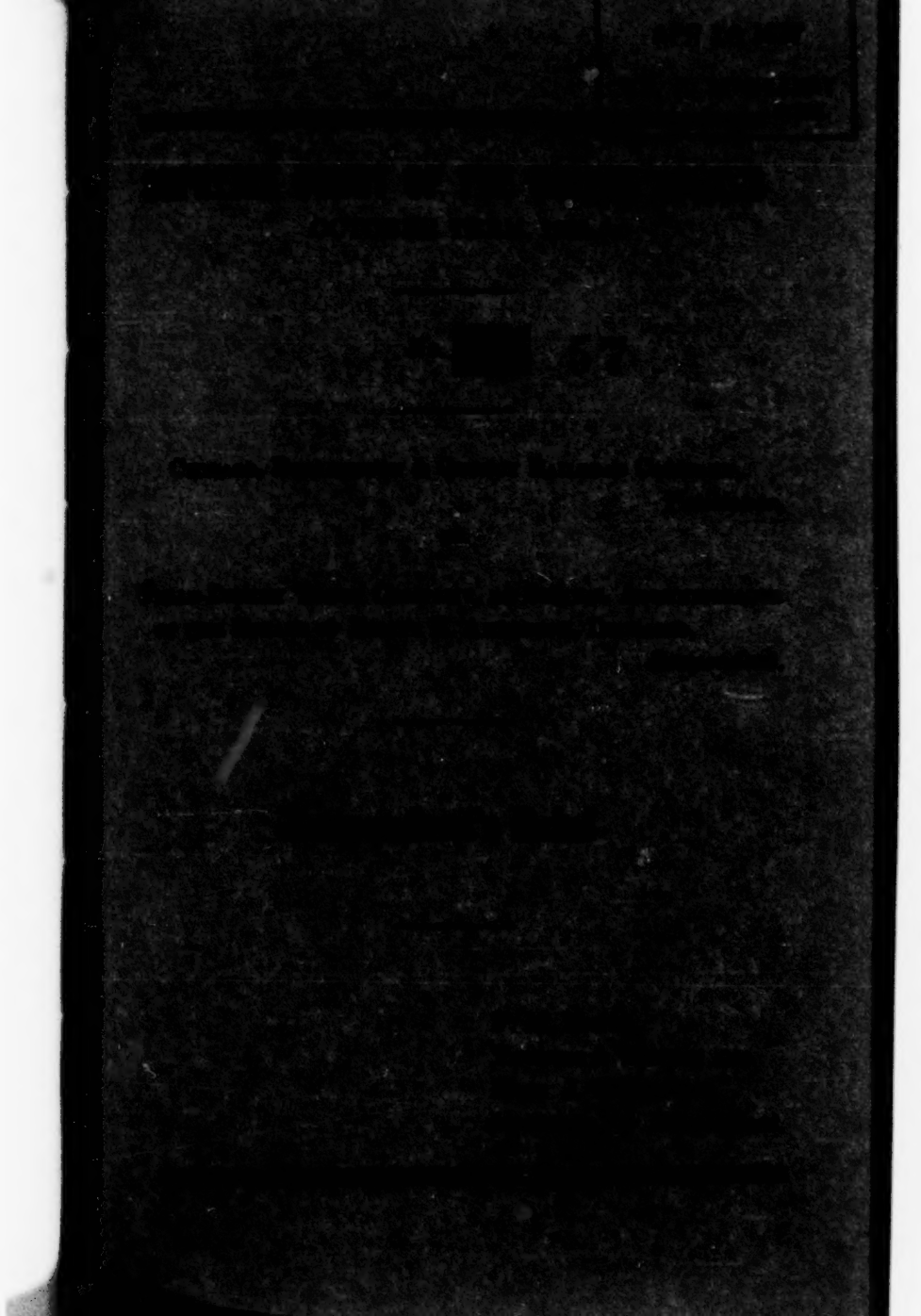

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1925.

No. 355.

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY,
Petitioner,

vs.

WELLS-DICKEY TRUST COMPANY, AS SPECIAL ADMINISTRATOR OF THE ESTATE OF EUMER E. ANDERSON, DECEASED,
Respondent.

Respondent's Brief

This appeal raises but two questions for consideration by this court:

1. Did the Congress by using the words found in the act relating to beneficiaries, intend that upon the happening of a wrongful act causing the death of an employee, if the deceased left surviving some one coming within, say the first class of beneficiaries enumerated, the right of being compensated by the wrongdoer should immediately vest, not in a personal representative, but in the person of the one thereby entitled to the benefits of a recovery so that, as in this case, if the one in whom such right has

vested, dies before compensation can be obtained of the wrongdoer, the latter is thereby relieved from liability to respond in damages for the wrong done, although there be still living some one or more within one of the other classes named who have suffered deprivation and loss of pecuniary benefits as the consequence of the wrong complained of, and

2. Does the evidence upon the record show a mere contract of employment between plaintiff's intestate and his sister, or does it show that the sister as a member of the family at the special instance and request of the brother deceased, was dependent upon him while she remained a member of the family, and because of such dependency and expectation of pecuniary benefit from the brother while living is therefore entitled to recover under the terms of the federal act?

We shall first discuss proposition No. 1 as above set forth. It seems to us to be a fair statement of the first claim made by petitioner. Whether or not such be the proper construction of the act is, of course, for this court to say. There are no particular rules of law with which we are familiar that can be of much aid in deciding the question. If it be claimed that the opinions of certain state courts dealing with death statutes are of value, we apprehend that such claim is erroneous, because all of such statutes are diverse in vital particulars from each other, and also from the act here in question.

The words used in the act are simple. We quote, "In case of the death of such employee, to his or her personal representative for the benefit of," and then follows a particular enumeration of those who naturally fall into three classes—wife or children coming first, parents second, and those more remote third. There is no declaration that the

liability imposed by the act shall vest in anyone, not in terms at least. The language is:

> "shall be liable in damages to any persons suffering injury while he is employed, etc., or in case of the death of such employee, to his or her personal representative for the benefit of,"

followed by an enumeration of the three classes.

If there be any vesting of the liability declared, it would seem to have been the purpose of the Congress that such vesting should be in the personal representative as a trustee. Any recovery, however, to be for the benefit of and go to the beneficiaries named in the order stated in the act.

The primary purpose of the Congress as gathered from the opinions by this court may aid somewhat in reaching a right result. That purpose seems to have been directed to the master or employer conducting and carrying on a business inherently more or less dangerous and that the thought of the Congress was directed to that fact rather than to those declared to be beneficiaries and who might be pecuniarily recompensed whenever a violation of the act should create a liability in favor of the designated beneficiaries because of the wrongful killing of an employee. The purpose seems to have been that by declaring civil liability in damages against the master, the result would be that the master would exercise a greater degree of care in the carrying on of his business, and that such greater degree of care would more certainly promote the safety of employees engaged in such hazardous work and also the traveling public using the facilities of the carrier in being transported in their person or property from one section of the country to another.

If petitioner's contention be valid then it is evident that this singular situation would arise. If an act of negli-

gence occurs on the part of the carrier and a human life is terminated, and, as in this case, the one killed has an invalid mother and a dependent sister, each an object of affectionate care to the son and brother killed, and the invalid mother survives the son by an appreciable moment of time, and then dies before the pecuniary loss suffered can be recovered, the wrongdoer by such death is instantly absolved from liability to recompense anyone for the wrongful death, and the sister still living and who has clearly been deprived of a reasonable certainty of pecuniary aid and benefit, cannot recover although admittedly the brother from whom she was receiving such benefits was killed through the negligence of the employer.

Suppose an employee, killed by the admitted negligence of the carrier, leaves an invalid wife and an aged and dependent father or mother or both. The shock of the killing of the husband causes the almost instant death of the invalid wife, and before any liability is declared against the wrongdoer, but the dependent father and mother or one of them still survives. The invalid wife suffers no loss because mercifully taken beyond the need of recompense by the wrongdoer. Having survived the husband by a few moments of time, the right created by the act upon the wrongful killing of the husband immediately vested in her and at once terminated by her demise and is gone, while the dependent parents live on for years, but can enforce no recovery against the wrongdoer because the right created by the act had vested in the person of the invalid wife to be immediately extinguished by her death, and the wrongdoer goes scot free.

If such be the proper construction of the act, of course, the court will say so, but it seems to us, with great deference, that a holding the other way would be more con-

sonant with the entire purpose and spirit of the act, and the antecedent events that are well known which brought about the action on the part of the Congress in the enactment of this law.

Petitioner at the top of page 15 of its brief states:

> "A new cause of action in favor of the sister could not arise by the death of the mother."

Obviously this is true, but why affirm that which no one denies?

Again, on page 16 of its brief, petitioner states:

> "The judgment in this case is on a different cause of action from that which arose at the death of the employee."

This we deny. In this case there is involved but one primary right so far as the question of legal liability is concerned. At the beginning this primary right was possessed by Mr. Anderson, and it imposed upon the petitioner a corresponding duty to exercise towards Mr. Anderson ordinary care in its dealings with him so that he would not be exposed to injury or death. The petitioner admittedly violated this primary duty and such violation resulted in negligence which caused the death of Mr. Anderson. At common law Mr. Anderson's death would have ended the matter. The Congress, however, under its constitutional power saw fit to change the rule of the common law and to provide that in case of death the wrongdoer should be liable in damages to certain enumerated beneficiaries suffering deprivation and loss as a result of the petitioner's wrongful act. There is only one *delict* involved here, the negligence of the defendant which resulted in the death of Mr. Anderson, and no matter for whose benefit an action might be prosecuted to recover for such wrong the facts establishing the *delict*, if admitted or proved, would

be identically the same.

It is true that the amount of damage to which petitioner might be required to respond because of its negligent act, might vary because of the different relation towards Mr. Anderson of the various persons designated in the statute as possible beneficiaries and the proof to establish a right of recovery as to each class of enumerated beneficiaries would vary. The testimony as to the amount which a widow or children might be entitled to would be different from the testimony offered on behalf of parents, or on behalf of more remote beneficiaries, but the wrong complained of, and in this case admitted, would be identically the same wrong no matter who might be found entitled to receive the benefit of any recovery against petitioner on account of its admitted wrong.

We respectfully submit that the cases cited by petitioner on pages 16 and 17 of its brief, which it claims have a bearing upon this question, are not in conflict with the contention here made by us. It is obvious that as to beneficiaries the personal representative is only a trustee and it is equally obvious that as to all proper steps taken by such personal representative to recover for the wrong done all beneficiaries who might be interested in receiving any sum obtained by such trustee, would be bound by each act rightly performed by such trustee in an effort to obtain for those entitled to receive it, damages against the wrong doer.

Beginning on page 19 of its brief, and continuing through the following pages down to and including page 30, the petitioner cites to the attention of the court numerous cases, most of which involve the consideration and interpretation of statutes of different states involving somewhat similar questions. If this court adopts the views as

expressed in the various cases so cited to the court as applicable to a consideration of the proper construction of the federal act here involved, then of course in that case, we assume that this judgment will be held to be erroneous.

The statutes of each particular state differ in phraseology from those of the other states and are diverse from each other in various particulars, which would have a bearing upon the construction to be given to each of such statutes. With reference to such cases the highest court of each particular state in construing its own statute, has merely expressed its own notions of what the legislature enacting the statute under consideration meant by the use of the words in the statute contained. How much of aid, if any, these opinions may be to this court in declaring the purpose of the Congress, we, of course, do not know. The statutes construed are as diverse from each other in some vital particulars as all are diverse from the federal act.

Beginning on page 46 of its brief, petitioner introduces an argument for the purpose of attempting to demonstrate to this court that the Congress in adopting the federal act did not intend to adopt the British statute known as "Lord Campbell's Act," and the petitioner asserts that the act differs from Lord Campbell's act, and the statutes of some of the states, and cases are cited to the attention of the court from which petitioner seeks to deduce the inference that the Congress purposely changed the phraseology of the act in order to indicate a departure from the construction which the English courts had given to Lord Campbell's act.

This court does not seem to agree with petitioner as to the facts or conclusions drawn by it as to what the Con-

gress had intended by the words employed. A careful reading of the opinion delivered by Mr. Justice Lurton in the leading case of *Vreeland vs. Michigan Central R. R. Co.*, 227 U. S. 59, seems to impel a conclusion the exact opposite of that drawn by petitioner.

In the first place as to whether the act should be narrowly or liberally construed in furtherance of effectuating its spirit and purpose, this court decided in favor of a liberal construction.

At the beginning of the opinion Mr. Justice Lurton speaks of the contention made by the railroad company as to the Congressional purpose, and says of such contention:

> "This is a narrow interpretation of the act, and would *operate to defeat all liability* unless the injured person should survive long enough to conduct his action to a recovery."

So here the petitioner's construction would operate to defeat all liability unless the particular beneficiary entitled to the recovery as fixed at the instant of death, should survive a sufficient length of time to permit the personal representative to prosecute an action to a recovery.

As to petitioner's contention that the Congress purposely intended to make the act in vital particulars diverse from Lord Campbell's act, the language of Mr. Justice Lurton clearly and decisively states an exactly opposite conclusion, for, to quote his exact words,

> "The statute in giving an action for the benefit of certain members of the family of the decedent is essentially *identical* with the first act which ever provided for a cause of action arising out of the death of a human being—that of 9 and 10 *Victoria*, page 93, known as Lord Campbell's Act. * * * The distinguishing features of that act (Lord Campbell's Act) are identical with the act of Congress of 1908 before its

amendment; (an addition not involving the question here discussed). First, it is grounded upon the original wrongful injury of the person; second, it is for the exclusive benefit of certain specified relatives; third, the damages are such as flow from the deprivation of the pecuniary benefit which the beneficiaries might have reasonably received if the deceased had not died from his injuries. The pecuniary loss is not dependent upon any legal liability of the injured person to the beneficiary. That is not the sole test. There must, however, appear some reasonable expectation of pecuniary assistance or support of which they have been deprived."

Having now shown conclusively by the foregoing, that petitioner is wrong in one of its deductions, it is fair to assume that the remainder are equally faulty and erroneous.

On page 51 of its brief, petitioner urges in effect that it was the intent of the Congress to adopt the type of statute classifying beneficiaries with priorities, which had been in force in many states for a long time prior to the adoption of the federal act, and that therefore, under a familiar rule it must be presumed that the construction of such statutes by the highest courts of the several states where such statutes were in force, is presumed to have intended to adopt such construction as applicable to the federal act.

We submit, that if the rule invoked has any application in the consideration of this case, such rule applies, not to the statutes of the several states dealing with a somewhat similar subject, but that such rule, if applicable here, would, under the decision of this court in the Vreeland case, apply to Lord Campbell's act, and the construction of such act by the English courts prior to the adoption by Congress of the Federal Employers' Liability Act. We

submit that it would be presumed that Congress was familiar with the construction placed upon Lord Campbell's act by the English courts, and that it was expected that such construction would be adopted and applied by this court in construing the various provisions of the federal act, and we submit that this expectation was carried out by this court in its opinion in the Vreeland case.

Mr. Roberts, in his work *Federal Liabilities of Carriers*, Vol. 2, Sec. 628, sets forth what he deems to be the true construction, as we understand it, of the federal act. He cites the Vreeland case, which he says is the leading case upon the question of the measure of damages in cases of death under the Federal Employers' Liability Act, and says that in the Vreeland Case

> "the Supreme Court promulgated some general rule as to the measure of damages, and cited with approval cases from various courts in which it was held that the rules were properly announced by the courts in those cases. In view of the conflicting rulings of the courts of the several states as to the measure of damages under death statutes, due no doubt to the different language of the statutes of the several states, and in view of the further fact that such statutes do not apply and are superseded by the federal act as to interstate employees, these cases approvingly cited by the United States Supreme Court on this question, are of value to the practitioner and the courts in ascertaining the proper rules and standards in determining the measure of damages to the various beneficiaries named in the federal act."

Mr. Roberts then takes up and considers the cases cited by this court in the Vreeland case, and deduces, what he regards, as the proper rule to be applied in the face of the decision by this court in the Vreeland case.

On page 8 of its petition, the petitioner refers to the case of *Garrard vs. Hocking Valley R. Co.*, 100 Ohio

St. 212, 126 N. E. 53, for the purpose of calling attention to the rule therein announced as follows:

> "By force of the statute the right to enforce the liability is not placed in the beneficiary."

This quotation is made by petitioner for the purpose of showing that the Minnesota court followed the rule as announced by the Ohio court, and that the rule conflicts with a principle announced by this court in the recent cas of *Reading Co. vs. Koons, admr.*, decided April 12, 1926, and *C. R. I. & P. Ry Co. vs. Schendel, admr.*, Oct. term, 1925.

We fail to see any conflict or inconsistency between the rule announced by the Ohio court and approved by the Minnesota court and the holding of this court in the cases just named. The principle this court considered and applied in the *Schendel case* was one of estoppel or *res adjudicata*. The holding was, as we read the opinion, that for the purpose of estoppel a beneficiary would be considered as represented in court in all proper steps taken, by the presence of the personal representative. In this case the mother while living and entitled to the fruits of the litigation, would be bound as to all legal steps taken by the personal representative or against the personal representative, and estopped from avoiding the consequences flowing therefrom. After her death the sister thereby becoming entitled to the fruits of the suit, would likewise be bound by all legitimate acts taken in the prosecution of the cause and estopped from asserting to the contrary. We wholly fail to grasp, however, how this admitted result can have any bearing one way or the other, either to sustain or defeat the petitioner's contention herein. While the opinion in the *Koons case* related to the statute of limitations and is not in point here as

we read the opinion.

Petitioner lays much stress upon the words used by the Congress in its enumeration of the different classes of beneficiaries, for after designating wife or wife and children as constituting the first class, the words "if none" are inserted before the inclusion of father and mother or either as composing the second class, and again before designating the more remote third class.

Here again we fail to grasp the vital significance which petitioner seeks to attach to these words "if none." Does their use necessarily imply that they indicate beyond doubt the purpose that they should be operative instantly upon the death of an employee negligently killed in violation of the act, and that if it appears upon such death that there be those within the first class enumerated the right immediately attached as to those in such first class, and although there be living beneficiaries in the other classes who suffer loss because of the death of the injured employee, that such other beneficiaries are at once foreclosed under all circumstances from any right of recovery although those who are shown to be in the class which would be entitled to the benefits of any recovery, if the wrong be established by the personal representative in a suit, pass away before a recovery can be had

By the very terms of the act if there be those in being at the instant of death who qualify as beneficiaries, but some of whom would constitute the first, some the second, and others the third class, and it appears that each member of the three classes has by the death been deprived of a reasonable expectation of pecuniary benefits by reason of the death, then each of the beneficiaries although placed in different classes by the terms of the act, have nevertheless each suffered a loss as the result of the wrongful act.

The Congress could have provided that in such case the recovery should be divided between the various classes according to the amount of probable loss suffered by each respectively. It saw fit, however, to provide that although some one in each class may have suffered pecuniary loss as a consequence of the wrongful act causing death, yet if there were widow or children, or both, they should be the favored ones, and be entitled to the entire recovery to the absolute exclusion of all those standing in the classes more remote as fixed by the law.

In this connection we desire to refer again to the case of *Garrard vs. Mahoning R. Co., supra*, and call particular attention to the language of the court in that case dealing with this specific subject, for to us it seems reasonable and logical:

> "We think that our statute does not vest the cause of action in any particular class existing at that time, but that the cause of action or the right to enforce liability, is distinctly vested in the personal representative of the deceased person in behalf of the class existing when the right is enforced by suit instituted by such representative."

And, also, to particular language found in the opinion in the case of *Morris vs. Spartanburg, etc., R. Co.*, 70 S. C. 279, 49 S. E. 854. The reasoning of the South Carolina court seems to us to be logical and in entire harmony with the spirit and purpose of such legislation. We quote as follows:

> "We think it would be too narrow a construction of the statute to hold that an action thereunder could abate as long as any beneficiary, person or class named in the statute existed. In this case, while it is true that the father would have been sole beneficiary in the event of his being alive at the time of recovery of damages, still the statute had other beneficiaries in contemplation in the event of his death.

> The brothers and sisters of the deceased named in the complaint are his heirs-at-law, and since they fall within the class of beneficiaries, while the action is still pending, the action should not abate for want of a statutory beneficiary. Under the statute, the action must be prosecuted in the name of deceased's administrator, and he is living to carry on the action for the benefit of whoever may be entitled to participate in the distribution of such recovery as may be had."

From an examination of the opinions in the cases cited by petitioner in its argument, from the states of Tennessee, Wisconsin and Indiana, it will be noted that the courts of those states in construing their respective statutes laid much stress upon the old rule so frequently declared and enforced by state courts to the effect that where a statute is in derogation of the common law, the same is to be strictly construed and never by any means extended beyond the clearly expressed purpose of the legislature in the enactment of such statute.

As we read the decisions of federal courts, the Federal Employers' Liability Act has not been subjected to the rule of strict construction, but on the contrary has been held by many federal courts to be subject to a rule of liberal construction in furtherance of the remedial purposes evidently in the mind of the Congress by the adoption of the law.

While we are not aware that this court has in terms applied the rule of liberal construction to this act, we submit that it has applied such rule to the safety appliance acts and surely the Employers' Liability Act should be construed in the same manner and in the same light and from the same viewpoint as the safety appliance acts.

Thus in *Johnson v. So. Pac. R. Co.*, 196 U. S. 1, this court expressly held that the safety appliance act there

involved was remedial in character and should be accorded a fair construction to accomplish the results intended.

So with reference to this act (Federal Employers' Liability Act) it has also been held by lower federal courts, for instance, *St. L., etc., R. Co. vs. Conley*, 187 Fed. 949, *Behrens vs. I. C. R. R. Co.*, 192 Fed. 581, as well as by some state courts that the federal act being remedial in its purposes, should be liberally construed in furtherance of the objects and purposes which it was passed to conserve.

This is the view taken by the Supreme Court of Minnesota in the disposition of this case, and to us seems a fair and just construction. In the opinion of the Minnesota court near the close as found on page 29 of the record herein, speaking of the Minnesota law which is practically in terms identical with the federal act, the court said:

> "If our statute were to be construed now we would hold that the liability of the employer continues from class to class of beneficiaries upon a preceding class becoming non existent through the death of its members after the death of the employee. The amount of damages recoverable may change, but the liability continues. Without a federal holding we construe the federal act as we would construe our railway act."

As pointed out by the opinion of the Minnesota court, in the above excerpt, the amount of the damages to be recovered upon a change of beneficiaries from a higher to a lower class would change, but this change would be to the advantage of the one guilty of the wrongful act causing death. It certainly requires no argument to show that those embraced in the first class, i. e., wife or children or both, would in almost every conceivable case be awarded, and their relation to the deceased would sustain, much larger damages than could be sustained in an award to

a father or mother, or both, and this would more certainly be true as between those in the first class and any possible beneficiaries named in the third class. This would also be equally true in almost every conceivable case as between father or mother, or both, and more remote beneficiaries such as brother or sister, or both, and would be certain to be much less to all those named in the third class, but who might be able to show that by the death they were deprived of a reasonable expectancy of pecuniary benefit to have accrued to them if the life involved had not been wrongly terminated.

We respectfully but earnestly submit that the construction given to the federal act by the Supreme Court of Minnesota is entirely consistent with the spirit and purpose of these remedial statutes passed by the Congress for the avowed purpose of greater protection to the lives of men engaged in the hazardous work incident to the carrying on of commerce by steam railroad, and for the greater protection of the public that so extensively uses such facilities in the transaction of such a large proportion of the business affairs of the nation, and that the result reached by the Supreme Court of Minnesota in its disposition of this case was correct and should stand.

The petitioner at the trial admitted that its negligence resulted in the death of Mr. Anderson. At the time of such death there were two beneficiaries coming within the terms of the act, the mother coming within the second class named, and the sister within the third class. In the face of the admitted fact of negligence and in the light of the purpose sought to be attained by the Congress in adopting this law, why should the circumstance that the beneficiary in the second class deceased before a recovery could be had, deprive the other beneficiary of a recovery

for the wrong done?

We are wholly unable to see how, if the recovery is allowed to stand, that any wrong is done to the petitioner, for it is, we think, obvious that if the mother had survived a sufficient length of time, that undoubtedly in the face of petitioner's admitted negligence, a recovery in her behalf would have been obtained, and that such recovery would very largely have exceeded in amount the sum awarded by the jury to the sister in this case.

On page 53 of its brief, petitioner asserts—

> "The evidence did not establish dependency essential to a cause of action for the benefit of a sister under the federal act."

With reference to this contention made by the petitioner, we submit that the same is wholly without merit and that a casual reading of the record shows that there is not contained therein anything which furnishes the slightest foundation for the oft reiterated statement of petitioner that the sister who is to receive the award herein if the result so far is sustained, was a paid servant in the home of the deceased brother, which was equally the home of the sister, and therefore not a beneficiary within the spirit and meaning of the federal act.

It is true that the counsel for the petitioner who tried the cause in the District Court sought upon cross examination to place the sister in the attitude of a paid servant. On pages 60 and 61 of the record will be found the testimony bearing upon this particular question. Near the bottom of page 60, and continuing over onto page 61, occurred the following:

> "Q. So his giving you amounts of money depended on what you needed for the house?
>
> A. No, what he gave me was to help me along. I couldn't stay there for nothing, you know, and I had

to have a little spending money for myself and my clothes, and a man don't understand that. So he agreed to give me enough for my clothing and spending money, etc. We worked together in a family budget and everything went together. If I wanted to buy anything for my mother in the line of furniture, if I had any extra money I would put it in. We worked together as a family.

Q. And in return for this money you rendered your services and took care of the household?

A. I acted as the manager of the household.

Q. You rendered your personal services?

A. Yes, sir, I rendered my services, but I wasn't hired by the day or week.

Q. I understand, there was no set sum of money; he gave you for your services whatever he felt he could afford to give and whatever you needed.

A. Yes, sir.

Re-direct Examination.

Q. Do you mean, Miss Anderson—let us get this so the jury will understand it—do you mean that the understanding between your brother and yourself was that you were to work there in the home as a servant for a salary?

A. Positively no, I was not a servant."

The foregoing seems to be absolutely conclusive, and shows the entire lack of any merit in the second contention made by the petitioner to the effect that the sister was not shown to be a beneficiary within the meaning and terms of the federal act.

There is involved here possibly the question as to just the sense in which the Congress used the word "dependent." Several of the state courts have passed upon the question and have construed the act as meaning that the dependent under the circumstances disclosed was at the time of receiving the contribution dependent upon such contribution for shelter, food and clothing, although such

dependent if deprived of such contribution would not necessarily become a public charge, but could by diligent labor earn sufficient to meet such requirements.

In this sense, of course, the sister was clearly dependent upon her brother at the time of his death. She had left her position at his request and returned to the home to assist in caring for the invalid mother and invalid sister, and while so doing and not possessing independent means and not earning anything from other sources, it is perfectly clear that the sister was under those circumstances while in the household maintained by the brother for the benefit of all, dependent upon his contributions both for her food, clothing and the upkeep of the house.

In the opinion of the Supreme Court of Minnesota upon the second appeal in this case, found in the record beginning at page 106 and continuing to page 111, will be found the reasoning of the Minnesota court and an extensive citation of authorities covering the question of dependency under the federal act.

We further contend that this contention of the petitioner is foreclosed by the opinion of this court in the Vreeland case. Mr. Justice Lurton in the opinion following the excerpt heretofore brought to the attention of the court, used this further language, which we submit has application to this contention of the petitioner:

> "Compensation for such loss manifestly does not include damages by way of recompense for grief or wounded feelings (citing cases). The word 'pecuniary' did not appear in Lord Campbell's act, nor does it appear in our act of 1908. But the former act and all those which follow it have been continuously interpreted as providing only for compensation for pecuniary loss or damage.
>
> . . . . . .
>
> No hard or fast rule by which pecuniary damages may in all cases be measured is possible. In *Lett vs.*

St. Lawrence & O. R. Co., cited above, it was said in the opinion of Patterson, J. A., after a review of all the English cases construing the act of Lord Campbell—

> "That there is through them all the same principles of construction applied to the statute. Each fresh state of facts as it arose was dealt with, and furnished a further illustration of the working of the act. The party claiming was held to be entitled or not to be entitled, the scale of compensation acted upon by the jury was approved or disapproved, in view of the immediate circumstances; but in no case has it been attempted to decide by anticipation what are the limits beyond which the benefit of the statute cannot be claimed."

The learned judge then quotes approvingly the following rule from Tiffany, *Death by Wrongful Act*, sections 158 160 162, and says:

> "The rule for the measurement of damages must differ according to the relation between the parties plaintiff and the decedent 'according as the action is brought for the benefit of husband, wife, minor child or parent of minor child, for the loss of services or support to which the beneficiary was legally entitled, *or is brought for the benefit of a person whose damages consist only in the loss of a prospective benefit to which he was not legally entitled.*'" (All italics ours.)

To us this reasoning of the learned justice seems to be apt, persuasive and conclusive upon the question and the construction contended for here by the appellant, for if such were not the case, and those in the third class under the federal act must necessarily be dependent in the sense that if deprived of the support taken away by the wrongful act, the one so supported would become a public charge or an object of charity, why would Mr. Justice Lurton say "The pecuniary loss is not dependent upon any legal liability of the injured person to the beneficiary

That is not the sole test. There must, however, appear some reasonable expectation of pecuniary assistance or support of which they have been deprived," or if the contention of the appellant as to the proper meaning of the word "dependent" is correct, why would Mr. Justice Lurton say in approving the rule from *Tiffany, Death by Wrongful Act*, "*Or is brought for the benefit of a person whose damages consist only in the loss of a prospective benefit to which he was not legally entitled.*" (All italics ours.) Strange language, it would seem to us, if the distinction which the appellant seeks to make is a valid one, and those enumerated in the third class by the federal act could only recover by showing a total inability to provide for themselves and the certainty of becoming public charges or objects of charity in case a recovery were denied.

We further urge that this particular question has been decided adversely to the petitioner's contention as the result of the findings of the jury herein. The cause was submitted to the jury under proper instructions by the trial judge, and to his statement of the law petitioner took no exception. On page 50 of the printed record herein, beginning with folio 150, the trial judge instructed the jury upon this subject as follows:

> "With that very brief statement of the facts we will turn to the law that applies to the matter of the recovery of damages. It is the law that the damages awarded in a case of this kind must be solely by way of compensation for pecuniary loss. No compensation may be allowed for wounded feelings or for loss of companionship and comfort of the deceased; or, as otherwise stated, the damages recoverable are limited to such loss as results because the sister has been deprived of a reasonable expectation of pecuniary benefit by the wrongful death of the brother, the damages being limited strictly to the financial loss sustained.

> The true test is, as to the amount of recovery, if any recovery is had, what, in view of all the facts and circumstances in evidence, was the probale pecuniary interest of the sister in the continuance of the life of the deceased."

We respectfully submit that upon this question of the conclusiveness of the verdict as against petitioner's assertoin that the sister was a mere hired servant and not a beneficiary within the meaning of the act, the decision rendered by this court in the case of *Seaboard Air Line Ry. Co. vs. Kenney*, 240 U. S. 489, seems to us very persuasive and final.

In that case it appeared that one Capehart, a minor, was employed by the defendant company as a switchman; that he was an illegitimate child; that his mother afterward married and had three children as the fruit of the marriage who were all under age at the time of her death, which occurred some time prior to the death of Capehart; that the latter was killed, it was claimed, by the negligence of the defendant railroad company and Kenney as representative brought an action against the railroad company for the benefit of the three children who were half sisters and half brothers of the deceased. A recovery was had in the sum of $8000.00 upon which judgment was entered, which judgment was affirmed by the Supreme Court of North Carolina, and the cause was then taken by writ of error to this court.

In this court three principal contentions were made, only one of which is material here. It was claimed that there was no proof offered upon the trial in the court of first instance to show a dependent relation between the children spoken of and the deceased half brother. As we read the record it does not appear that these three minor

children were wholly dependent or wholly supported by contributions made for their support by Capehart during the period intervening between the death of their mother and his death as the result of the negligent injury. All that appeared was that he made some contribution to the support of these three children of his natural mother. In disposing of this objection Mr. Chief Justice White, who delivered the opinion, said:

> "Insofar as it is suggested that there was no proof tending to show a dependent relation between the next of kin who were recognized and the deceased, so as to justify a recovery under the statute, it suffices to say that it was expressly foreclosed by the finding of the jury, sanctioned by the trial court, and was not questioned in the court below (the Supreme Court of North Carolina), and at all events involves but a controversy as to the tendencies of all the proof, foreclosed by the action of both courts which we would not reverse without a clear conviction of error, which, after an examination of the record on the subject, we do not entertain."

See also *Richlieu vs. C. P. Ry. Co.* (Neb.), 149 N. W. R. 772; *Brackshaw vs. Chi. R. I. & P. R. Co.* (Ia.), 155 N. W. R. 273.

There are cases to be found in the higher courts of some of the states construing state compensation acts where such courts have held that under the peculiar terms of their statutes the word "dependent" should be considered in the sense as contended for by the appellant herein. While we do not quarrel with such construction so placed upon such statutes by the courts of last resort when called upon to construe them, we nevertheless respectfully submit that they should have no weight in the determination of this question as applied to the act of Congress. The purpose of this act repeatedly declared was not to enable

common carriers to escape liability for negligence resulting in the injury or death of employees, but for the very purpose of enforcing upon such carriers greater care in the selection of their appliances and their employees who were to operate the same, and for the express purpose of giving to the classes of persons designated full and fair compensation in all cases where the carrier was found guilty of having violated the law enacted for the safety not only of employees but of the public. And this view we think is strengthened by the fact that while most courts in construing statutes passed in derogation of the common law hold that such statutes are to be strictly construed, such is not the rule with respect to the act of Congress, for this court has repeatedly ruled that it is a remedial statute and to be fairly construed in the furtherance of the purpose and object had in view by the Congress in the passing of the various laws such as the Federal Employers' Liability Act and the Federal Safety Appliance Acts.

It appears to us that the foregoing sufficiently meets and refutes the contention of the appellant; that the proof on the record is abundant to sustain the judgment; that such judgment is strictly in conformity with the letter and spirit of the act of Congress; is therefore right and should be affirmed.

All of which is respectfully submitted.

F. M. Miner,
Tautges & Wilder, and
Robt. J. McDonald,
Attorneys for Respondent.